IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUSTIN BELL, ET AL.,

PLAINTIFFS

VS. CIVIL ACTION NO. 10-320

CITIZENS FINANCIAL GROUP, INC., ET AL.,

DEFENDANT

PROCEEDINGS

Transcript of PRETRIAL CONFERENCE, commencing on FRIDAY, DECEMBER 14, 2012, AT 3:00 P.M., in the United States District Court, Third Floor, U. S. Post Office and Courthouse Building, Pittsburgh, Pennsylvania, before the HONORABLE GARY L. LANCASTER, UNITED STATES CHIEF DISTRICT COURT JUDGE.

APPEARANCES:

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

FRIDAY AFTERNOON SESSION, DECEMBER 14, 2012, 1:30 P.M.

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P R O C E E D I N G S

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(Whereupon, the following in-chambers conference was had.)

THE COURT: Good afternoon. Have a seat. Apparently, no one told you about casual Friday. Missed the memo. Okay. Who are you, who do you represent, and where are you from?

MR. DONELON: Brendan Donelon, plaintiff. Kansas City, Missouri.

MR. WINEBRAKE: Pete Winebrake, from Dresher, Pennsylvania, which is outside Philadelphia, for the plaintiffs.

MR. SANTILLO: Andy Santillo, also from Dresher.

MR. CRAIG: Daniel Craig. I work with Brendan Donelin, Kansas City, Missouri. Plaintiffs.

MR. BATTEN: Mark Batten, Your Honor, from Boston, for the defendants.

MS. BLOOM: Elise Bloom, from New York, for defendant.

MR. GERSHENGORN: Brian Gershengorn, from New York, for defendant.

MS. LANGLAIS: Alison Langlais, Boston, for the

defendants.

THE COURT: Okay. We have three of the best football teams in the room and one of them works. Don't have to point fingers.

MR. DONELON: Try figure that one out on your own.

THE COURT: I want to know who you are. And the only time the Steelers get to the Super Bowl is if we don't have to play New England.

MR. BATTEN: Hope you won't hold that against me, Judge.

THE COURT: No. All you have to do is lose a game in this case.

MR. BATTEN: I thought the Texans were going to take us out of it.

THE COURT: Well, the Steelers are on a bad slide here.

MR. BATTEN: Everyone's hurt.

THE COURT: I guess we've had all the discovery that's going to be taken has been taken; right?

MR. DONELON: Correct.

MR. BATTEN: Yes.

THE COURT: Do you have an expert?

MR. BATTEN: We do.

THE COURT: Economist of some sort?

MR. BATTEN: I mean, the liability part of her

testimony is to talk about the difference in pay between the plaintiff class and other employees. That's all she's going to talk about, because that goes to whether they were exempt or not, if there was enough of a difference in their salary. There's a few calculations associated with that. That's why we have an expert. But she'll be brief.

THE COURT: You object to that, I guess?

MR. DONELON: It's one methodology. It was something that we addressed in a motion in limine. I'm not exactly -- I'm not sure what methodology she follows in her expert report. We had submitted and Judge Conti just issued an opinion about some mathematical formula used to compare the two.

MR. BATTEN: Which we don't object to.

MR. DONELON: Then we have an expert. And I don't think the parties are necessarily in disagreement on bifurcating liability and damages. Our expert would be testifying, if liability's found against the defendants, regarding just class damages.

MS. BLOOM: Our expert is on both.

THE COURT: On damages and liability?

MR. BATTEN: Yes. Right.

THE COURT: Let's go through some of these. See if we can reach some agreement.

Now, some of the questions you've presented in the

pretrial statements, plaintiffs must submit Citizens employees, Pete Camilleri, Jacqueline Courtwright, and Lisa McGraw. Are they your employees?

MR. BATTEN: Ms. Courtwright is no longer with the defendant. The other two are current employees of the defendant, but they are in New York and Chicago. Mr. Camilleri is in Chicago. Ms. McGraw is in New York.

THE COURT: You want to make them, subpoena these people or produce them?

MR. DONELON: They're the employees of the defendant, not the plaintiff.

THE COURT: I'm sorry. I got them backward.

Do you want them to subpoena them or?

MR. BATTEN: They can't subpoena them because they're too far away. I think both of them are likely going to testify in our case. The plaintiffs are free to examine them and then we would.

THE COURT: So, kind of a moot issue here.

MR. BATTEN: I don't know what the plaintiffs would say to that. We haven't --

MR. DONELON: We don't think it's a moot issue. First off, we think that they can be subpoenaed. We've done some research and there is this issue as to whether or not you can subpoena somebody outside the hundred-mile radius.

There's another part of the federal rules that talk

about subpoenaing parties or the parties' officers outside that hundred-mile range, at least the research we've done, and we've found the majority of the Courts state that if it's a party, party officer, they can be subpoenaed for trial outside the hundred-mile radius.

These three people appear under 30(b)(6) notice of deposition. So, they all appear in the corporation's behalf, these depositions, for the topics covering them.

So, that's what we want to examine them on. Our position is they're all actually parties. Now, one of them is a former employee. First time we found out that Courtwright was a former employee is when we got their pretrial statement. That was one of the legal issues that was raised, which is whether or not we have to subpoena a former employee Courtwright. Our position is that when she gave the deposition testimony, she was the company. She's remaining with the company. We think we can subpoena all three of them. Only Ms. Courtwright, if there is an unwillingness to do that, we'll subpoena them. Call them in our case in chief. Take a trial deposition on video tape.

THE COURT: Why don't do you this. Why don't you decide if you're going to call them in your case.

MR. BATTEN: Yes.

THE COURT: If you are going to call them in your case, we don't need to go through any of this. We can make

some agreement. They can take her out of turn. We don't have come back and forth.

MR. BATTEN: That is our principle concern, twice, separated by a couple weeks.

THE COURT: Matter to you?

MR. DONELON: That would be fine with us. I think the only one is Courtwright.

MR. BATTEN: She's a former employee. We don't control her, anymore. She lives in Albany, I think. So, whether she's going to be able to attend or not, as of this moment, I just don't know, Your Honor.

THE COURT: Find out within the next ten days and let them know what you're going to do. You'll know.

MR. WINEBRAKE: Your Honor, can I just ask a question? What the Court is contemplating, though, is we would get to call them. They would testify during our case. Just so the scope of their testimony could include that they were getting called by the defendants.

THE COURT: Yes. We tell the jury all the time, for scheduling reasons, sometimes witnesses are called out of turn. Then you would have a chance to examine them on what you wanted them to say and then we'll go back on schedule here. This is not an uncommon experience; okay?

Whether the propriety of a three-year limitation is a jury question. I'm not sure. My understanding from your

complaint, all your plaintiffs come within the two years.

MR. DONELON: There's some part of the putative class -- some plaintiffs limited to two years and there's going to be some class members who aren't going to have a claim for damages.

THE COURT: I thought your complaint itself said everybody came within two years.

MR. DONELON: Yes. That's, I guess, also the ones who are class members within, who would also be allowed to collect three years. Question under the law is whether there was a willful violation. I don't think, at least either side's jury instructions, I think we both put it in there for the jury to decide whether --

MR. BATTEN: We agree.

MS. BLOOM: But it would go on bifurcation to the second, if there were liability.

MR. DONELON: Right. Actually, they would decide the first part of the case, whether they were liable for over-time, and, B, when it was a violation, because we put on damages and we don't know whether or not we have evidence for two years or for --

THE COURT: So, you're going to have some members of your class who might win on liability and get no money.

MR. DONELON: That's correct. It's possible. If the jury finds it wasn't a willful violation; correct.

THE COURT: Okay. I think it is a jury question.

So, all right. Now, let's go over some of these motions in limine. Some of the other stuff, we might be able to answer these today. Maybe not.

Plaintiffs have filed a motion to exclude evidence of any employee benefit, including health insurance, other insurance, retirement benefits, outside of the salary and bonuses.

MR. BATTEN: There is no opposition to that, Your Honor.

MR. DONELON: I said it was okay. Yes. Bonus is fair game.

MR. BATTEN: We're only talking about insurance benefits. Basically, we don't intend to present any evidence about that. So, there is no opposition.

THE COURT: Plaintiffs want to exclude evidence of ABMs not making internal complaints to defendant about not being paid overtime. You intend on introducing evidence about them not making internal complaints?

MS. BLOOM: Yes, Your Honor. We do. We intend to introduce evidence as to them not making internal complaints. It's our position, and I do believe there is a Seventh Circuit, not Third Circuit, but Seventh Circuit case that addresses this issue which holds that whether or not they asserted an internal complaint at the time that they were

functioning as an ABM is an indicia, whether they considered that the duties that they were performing were managerial or not managerial.

One of the concerns that the plaintiffs have raised is that the jury might be confused and might think that that was a waiver of their claims in this case. But that can be cured through an instruction.

And so, we believe under, it's Moylan versus Meadow Club. Case cite, 979 Fed. Second 1246, that the evidence as to whether or not they filed an internal complaint should come in. It appears, again, an indicia of whether or not they considered themselves to be performing managerial or non-managerial functioning.

It's significant for the assistant branch manager as one of their jobs was making sure that the hourly worker properly recorded their time. So, certainly, that made them aware of fact that hourly workers had to record their time in order to be paid overtime.

As to whether an assistant branch manager raised a complaint would, at least the jury could evaluate whether that person was being credible, the assistant branch manager, where they testified if they had, that they believed they were performing non- or primarily non-managerial functions. As I said, you know, any confusion could certainly be dealt with through a jury instruction.

MR. DONELON: The entire body of case law out there, I haven't had chance to look in detail what she's referenced, but I'm sure your law clerk will have all the statutes completely what's relevant under Fair Labor Standard Act, whether the person making a claim for loss of overtime made a complaint internally or not is a prerequisite to getting damages or remedies under the law. It's not their requirement under the law to make sure what they're doing allows them to get paid overtime or not. It's the employer's burden. I mean, the large body of case law says the exact opposite.

THE COURT: I will hold off on that one. Everybody agrees, however, that it's not an administrative prerequisite to file a claim?

MS. BLOOM: Right. That's why I said, Your Honor, that could certainly be addressed in a jury charge. But there is authority and we have cited authority to the proposition that it is a factor that the jury could consider in evaluating the credibility of an assistant branch manager that testifies that he or she did not believe that they were performing managerial functioning.

THE COURT: Okay. The plaintiffs want to exclude evidence from any Citizens branch manager of any knowledge they have of ABMs who did not opt into the case.

You plan on introducing evidence?

MR. BATTEN: Yes, Your Honor. On this one, that

Your Honor, raises, is connected with motions both that the plaintiffs have filed and we have filed. There is a whole cluster of motions back and forth about sort of the scope of witnesses at trial.

What the plaintiffs want to say is we are going to cherry-pick fifteen people out of this class. They're going to come and testify about their own experience. And the only evidence that should come in at all is something related to one of those fifteen people.

What we say is, and Your Honor has already held in denying the motion for de-cert, that they can proceed by way of representative evidence. That's fine. That's the law of the case. We accept that. The question is, is the evidence that they're going to present representative.

And that, to us, is an absolute question of fact. The jury's going be asked to make an inference of their fifteen people as to the work situations of the other four hundred seventy-some people. That kind of an inference from the facts is a question of fact and we want to be --

THE COURT: That kind of inference from the facts is a question of fact. That's a heck of sentence.

MR. BATTEN: Let me try again with that one. It's not a legal issue. It's a factual question whether the testimony that they present from fifteen is representative of the four hundred seventy. They don't cite a single case,

we're not aware of one, where a Judge has said I'm going to decide that factual question before trial.

So, yes. We want to be able to present --

THE COURT: You want to bring in some other people who are not opt-in people to say, hey, I didn't do anything they're talking about.

MR. BATTEN: I managed. That's the way the branch manager treated me.

THE COURT: You can bring them in.

MR. BATTEN: Thank you.

MR. DONELON: Your Honor, can I have an opportunity?

THE COURT: Sure. Go right ahead.

MR. DONELON: When you decided that this case was to proceed as a collective class action -- at the time the case was really clear. The only relevant evidence the Court could look at was evidence from the, from the collective class, collective class composed of people who opted into the case and joined the case. What they did at work is the only thing that's relevant.

If they're allowed to bring in people who are not class members, I know that I have to prove people who are not class members were improperly classified. That just doesn't make any sense in the case.

Also, it's not my position, what I am saying to you right now, that they're not relevant, that's their position.

In all of their discovery responses they said the only thing relevant in what we're going to produce is evidence dealing with the plaintiffs and opt-in plaintiffs because that's the only thing relevant to this class claim. We didn't disagree because that's a correct statement. More importantly, Judge, in their Rule 26 disclosures, they have to set forth everybody who they plan on using to assert their defense. That means individuals were properly exempt.

In their Rule 26, which we relied upon in litigation in this entire case, it said the only thing that's relevant are the class members, the plaintiffs, the opt-in plaintiffs. And the people that worked with those people, they didn't provide any position or contact information.

THE COURT: That's an argument for to you make to jury.

MR. DONELON: If they put --

THE COURT: You can get up there and say, listen, these aren't even plaintiffs. They never claimed being non-exempt.

MR. DONELON: Great. I can live with that. The other thing I need to point out, Your Honor, that is of some concern, on their witness list are fifty-two, as an example, fifty-two people who are assistant branch managers who are not part of this case. They've identified these are people they intend to call to give testimony. All of those people, the

only contact information is the name. Says, if you want to contact them, then contact our law office to do so. We represent all those people. Now, all those people are putative class members in the certified class action in the State of New York or in the State of Pennsylvania. Once those cases became certified as a class action, we represent those people. They have not opted out of the case, yet. Notice has not been sent out, yet. So, these people that they want to call are our clients. They should not be communicating with these people. Period. They tried this before in the Ross case in Illinois. We had the case certified as a class action under Rule 23. They appealed. Discovery notice was stayed. But those people, the class, became our clients. When the case got certified, what happens is they talked to some of those people.

THE COURT: Did you talk to some of these people and try to get their claims settled outside of their attorney's presence?

MR. BATTEN: In this case? No. We did not.

MR. DONELON: It's the exact same scenario in -- they're our clients. We should be able to --

THE COURT: I accept counsel's representation they didn't do it.

MR. DONELON: Well, I need to know about --

THE COURT: He just said no.

MR. BATTEN: We're not trying to settle anything.

THE COURT: Did you talk to them?

MR. BATTEN: We haven't spoken to them.

MR. DONELON: Since the case got certified in New York. Make sure that's clear.

MR. BATTEN: I don't know the whole list of people. We have witnesses coming from different states.

MR. DONELON: Handful from Massachusetts.

MR. BATTEN: Well, I don't have that list in front me. We understand the issue, Your Honor.

MR. DONELON: So, if we -- the interesting part is, Judge, they can't -- for them to say we want to call them as a witness, they're not class members in this case. We represent them as clients in another case. They're outside the hundred-mile radius to subpoena them to come to this case. They're not clients of ours in this particular case. They're clients of ours in the New York case. To get them to come to testify at trial, I mean --

MR. BATTEN: They're entitled to come testify if they choose to come testify. We're entitled to invite them to come to Court.

THE COURT: Just communicate to counsel, that's all.

MR. DONELON: We'll get their contact information, call them, and have a conference with them, whether they want to testify or not.

THE COURT: Yes. All right.

Plaintiffs want to exclude evidence regarding any prior actions, both civil and criminal. What is this about, now?

MR. DONELON: We just know that some of our clients in the depositions had had bankruptcies, maybe fifteen, ten, fifteen years old. This might be one of the ones you'll need to know the morning of.

THE COURT: Each morning we meet and you let me what are the potential issues.

Do you plan on introducing any testimony about prior legal actions of any of these plaintiffs witnesses?

MR. BATTEN: There are a couple of instances, Your Honor, where, first of all, the motion was about personal family circumstances. We are not going into any of that. There are some witnesses who were convicted of crimes that go to their credibility, that sort of thing.

So, in some of those specific instances, yes. We may want to explore criminal convictions or other sort of fraudulent activity, those kinds of things, that might go to their credibility. Seems to me that's the kind of issue that needs to be dealt with as testimony come in.

THE COURT: There's limitations when you can use it. You can ask the --

MR. DONELON: As long as you give us a head's-up.

That's fine. We can just address that.

THE COURT: I'll defer. Plaintiff wants to introduce evidence of any individual ABM who did not -- we had this already.

MR. BATTEN: That is one of the others that was associated with it.

THE COURT: Evidence of any ABM not on either party witness list or evidence suggesting the indication and not proceed on a representative basis as irrelevant. You intend on arguing this case can proceed on a representative base.

MR. BATTEN: Preserving the record with that point, Your Honor. You have already ruled that representative evidence is an acceptable methodology. We understand that's law of the case.

THE COURT: Denied.

MR. BATTEN: Goes to the same point.

THE COURT: Plaintiffs want to exclude evidence regarding opt-in plaintiffs' personal family and financial circumstances.

MR. BATTEN: That's the one we were talking about. To the extent we are talking about personal family circumstances as opposed to --

THE COURT: This is denied.

MR. BATTEN: -- fraudulent convictions.

MR. DONELON: Your Honor, that was plaintiff's

motion.

THE COURT: That was plaintiff's motion.

MR. WINEBRAKE: That's denied?

THE COURT: It's unopposed.

Defendant wants to exclude plaintiff's expert witness. Are you asking for a Daubert hearing here?

MS. BLOOM: Yes, Your Honor. But we could, probably, if you wanted to defer on that, if we're going to bifurcate the case, since their expert only goes to the questions of damages? So, if you would prefer, we can wait until it happens to see if there is a liability finding.

Essentially, there were two bases for our application. We did want to have that Daubert hearing. Their expert report is truly expert testimony. It's simple math, also.

THE COURT: All right. Tell you what. If there is, if there is a liability finding, we'll have a Daubert hearing on it. Then, we'll do it at that time.

MR. DONELON: Okay. Both parties have briefed it fairly extensively.

THE COURT: Okay.

MR. DONELON: So, the legal argument each side is making, whether it should or should not get in, is established.

MR. BATTEN: Your Honor, individuals who may

represent, because just thinking about it, they may represent these people in unrelated cases. They don't represent those individuals in this case. So, if I don't speak to them about those cases in which they are represented, I don't think I'm barred from talking to them about this case. Rule 4.2 says, the ethical rule is, don't talk to people who are represented by counsel in the matter.

THE COURT: Yes.

MR. BATTEN: Well, in that, I agree. I can't talk to them about the New York case, I can't talk to them about the Massachusetts case, because they're represented by counsel. Those individuals who are on our list are not represented by counsel in this action. So, I don't know why I couldn't speak to them about strictly for the purpose of preparation for this case and testimony in this case where they're unrepresented.

MS. BLOOM: They elected to not opt-in.

MR. BATTEN: They elected to not opt-in.

MR. DONELON: They are -- it's the exact same claim, though. Exact same factual situation. I found just a case, I knew this issue would come up, and if the Court wants further briefing I would be happy to do it. It was actually a case like this where there was a class action in State court and there was a class action in federal court, both asserting the same claims. Getting ready to go to trial in federal

court. The putative class members over here were certified, were already represented by the same counsel. Both making same claims. As long as it's the same material thing going on, I mean, they want to go talk to them about what they did as assistant branch manager in the Bell case and somehow the claim that these are completely different than the assistant branch managers in the New York case, they're making both claims legally.

THE COURT: All right. For right now, the Court is willing to stand on its ruling, but I'll look at it, though.

Defendants want to exclude evidence relating to defendants' conduct during discovery. What did you do during discovery?

MS. BLOOM: The reason for that motion was precautionary, because in some of our conversations it's been suggested that we didn't produce what we needed to produce. And so, we just wanted to make sure that there wasn't going to be any kind of comments made about what went on in the discovery process.

MR. DONELON: I mean, outside of that, Your Honor, obviously, interrogatory answers were provided. There were admissions by the company. Obviously, if we requested certain documents with specific requests, they gave us a document identifying all the documents to that request scope. With new documents, they have provided to us, without a Bates

stamp, we would take the issue up the Court, but --

THE COURT: That's not what this is.

MR. DONELON: As an example, we asked them to provide us all of the documents showing these assistant branch managers doing supervisory type duties, like writing people up, doing performance reviews, counseling people, all the things that supervisors do. We wanted all the paperwork that these people did showing that.

And we got fifteen pieces of paper for four hundred seventy people. They all dealt with one person who was covering an branch manager. He was an ABM. So, I think it's important that we have the ability to, if we put on this trial, we call twenty witnesses and they have absolutely no paperwork demonstrating these twenty witnesses doing any supervisory work, I should be able to make that argument as a closing.

THE COURT: But that's not what this is. They want to exclude evidence relating to defendants' conduct during discovery.

MR. DONELON: I guess I'm just more confused about is what their referring to.

THE COURT: I assumed there was some dealings that they did, something that was unethical.

MS. BLOOM: It's just -- there's been -- yes. There was some statements made, not necessarily unethical, but some

statements about our discovery response. I, out of an abundance of caution, want to make sure that none of that would be commented on in the trial.

THE COURT: Okay.

MR. DONELON: I don't recall it.

THE COURT: That's granted; yes. Met and conferred on these?

MR. DONELON: We did.

MR. BATTEN: I think both sides' position, they've evolved since that.

MR. DONELON: We're not exactly sure what you have to put in writing.

THE COURT: Defendants want to exclude evidence regarding defendant's bad character. Bad acts. What bad acts do you have?

MS. BLOOM: Same thing. Just in case any comments about, negative comments about the bank, any negative comments, any legal proceedings about any of our witnesses. Other than things that would be allowed under the federal rules.

MR. DONELON: Make some negative comments about the bank in closing dealing with wage and hour? I'm not going to, like I just said, for one hundred twenty-seven million dollars inappropriately charging of overdrafts? I'm not going to try to delve into. I don't have an issue, people arguing about

it.

THE COURT: Okay. Defendant's want to exclude evidence of defendant's financial condition, net worth, and compensation, paid to executives.

MS. BLOOM: Yes, Your Honor. Completely irrelevant to the claims that are being asserted here. This is not a case where you've got punitive damages, which in any case would be reserved for the damage phase of the case. But the claims don't have punitive damages that attach to them and any statements about the bank's financial condition or about what executives at the bank earnings would be irrelevant and highly prejudicial.

MR. DONELON: As long as there is no, woe is me comment. Like don't do this because it's going to cost this much or cost people to lose --

THE COURT: Anything along those lines.

MS. BLOOM: Yes, we're not saying.

THE COURT: That's granted.

Prohibit plaintiffs from offering representative testimony regarding liability and damages or alternative to offering statistically significant number of witness.

MR. BATTEN: That is one Your Honor dealt with.

THE COURT: Yes.

MR. DONELON: Just, just for a clarification on that. There are four hundred seventy people who joined the

case. We've picked put thirty on our witness list. We don't think, obviously, we're going to have enough time to call all thirty. We mentioned that in our pretrial statement. They were free to pick any of the class members they wanted to to put on their witness list. They picked, roughly, close to thirty who were not our thirty. So, they did find some of the opt-in class members they wanted to call as witnesses.

So, whoever does get called as representative testimony, it's not cherry-picking. I'm only saying this is -- they also did have the chance to cherry-pick whatever opt-in class members they wanted to to put on testimony. So, I just wanted to make a clarification on that, however the representative testimony gets put on, we're kind of hoping before we leave here today we get some guidance from the Court as to what the Court feels time-wise.

THE COURT: We'll talk about that.

Defendants want to exclude evidence regarding fraud and Project Park.

MS. BLOOM: Project Park was a re-organization that began in January of 2011 and was implemented in May of 2011. The reason why I mention those dates is because the dates are very significant.

Project Park was a re-organization where the company looked at its work force and it looked at its banks. There are, basically, two kinds of Citizens banks. There's the

bank, the more traditional kind you see on the street, the stand-alone bank. There's the bank that's the in-store branch, the smaller bank. Tends to operate seven days a week.

So, the company looked at its overall staffing and determined that in some of its branches that its staffing would be better served to have less or no assistant branch managers and to have more either tellers or more bankers that were engaging in, for example, selling-type activities. So, the company did a re-organization and, as a result of that, some people that were assistant branch managers became either bankers or tellers.

Why I mention the date and why I think the date is very significant is because this case has nothing to do with that recourse. By the time that re-organization took place, the opt-in period had closed and none of the people who have opted into this case had opted in as a result of the re-organization.

The plaintiffs want to offer testimony about the re-organization because it's their position that that somehow demonstrates that we believed that at the time prior to the re-organization that the assistant branch managers were performing non-exempt functions and that that's why we re-organized, we re-organized to fix the problem that caused this case.

It's our position that not only would any evidence

about this subsequent re-organization be irrelevant and it would be irrelevant because the question at issue here is whether at the time that the assistant branch managers, each individual assistant branch manager, was performing his or her job, whether that person was performing managerial functions.

Not only do we believe that this evidence of the subsequent re-organization would be irrelevant, but we also believe that it falls under Rule 407 and could be considered like a subsequent remedial act.

In addition to that, and their own exhibit list actually bears this out, if you were to allow this, what we believe is to be irrelevant, prejudicial evidence. There would be a substantial amount of testimony and documentary evidence that would go towards having to describe the re-organization. It would be like a trial within a trial. And if you look at their exhibit list, you see that I think fifteen of their sixty-five exhibits are all about Project Park. So, even they believe that this would result in a trial within a trial.

So, Your Honor, for all of those reasons, it's our position that there should be no evidence regarding the Project Park re-organization.

MR. DONELON: I'll try and make it a little more simple. Project Park, basically, happened after we filed this lawsuit, after this Court granted conditional class

certification, after it was fought pretty hard by both sides and you granted conditional class certification. Allowed notice be sent out.

After that occurred, the bank goes in and has existing branch managers now are moved from ABM positions, assistant branch manager positions, to banker positions. They're now being paid overtime. These documents Ms. Bloom's referring to, a lot of it contains the remaining half of what they did. What they did is they completely re-wrote the job description to very explicitly state activities that are exempt under the FSLA, things that never existed in the prior to detailed job description. For these folks, much more detailed on the information, be it subsequent remedial. The case law that we provided has to do with what they're doing is a correction. Every case law says if you're going to try to kick something out because of a subsequent remedial issue, it's on the basis that the defendant is saying, hey, we're trying to fix this. Here we are trying to correct a wrong. A remedy. Don't hold it against us. That's the whole policy behind that rule.

There is a case in here that we cited that, basically -- and in all our, in all the pleadings to the Court, they did the opposite. From day one, they said not correct. This has nothing do with fixing a problem. That is, what we are doing is a complete business decision, unrelated

to trying to correcting the problem. Another thing that's important, Judge, is we've got some folks who are going to come in and testify, who are current employees, or recently, not current, anymore. But were, they were the ones that came to work one day as an assistant manager and their supervisor called them in, Mr. Patterson is one of them, and said you're being re-classified to banker's position. And his testimony is going be, okay. His testimony is going to be about he was told you are doing the exact same thing you've always done, which is what he did. Our position here is the bank assistant branch manager and banker are the same things. That's the position of our case. It's not a subsequent remedial measure. There is no admission by them that this is actually tied to a recommendation. So, the plausibility of their -- if the feasibility of them is to observe a problem and correct a problem, Project Park shows at least some attempt by the company to take a look at this position and do something about it, at least in the form of re-writing the job description.

MS. BLOOM: If I may respond, Your Honor. Just to a couple small points.

First of all, with regard to any new job description, that's clearly irrelevant to whether or not the people operating under the old job description were performing exempt or non-exempt tasks.

I just wanted to talk for a minute for all the

witnesses who are going to come in and talk about Project Park. There's only twenty-eight of the opt-ins who were impacted by Project Park. And, significantly, Your Honor, on their thirty-three person witness list, the person that Mr. Donelon spoke about is the only person that was impacted by Project Park. So, to say that all these people are going to come in and talk about it is not exactly accurate. In fact, I think --

MR. DONELON: That is not relevant, though.

MS. BLOOM: Well, it is relevant. The other thing that's important to know is that of the opt-in people here, ninety percent of them are former employees who wouldn't have even been impacted at all by Project Park. So, the Project Park, additionally, we believe it's not relevant. We believe that it does fall under Rule 407.

THE COURT: What about his argument that there has to be some type of expressed admission that this is why we're doing this? We are fixing up this problem.

MS. BLOOM: I disagree with that. I disagree with that. I think it falls within the purview of what could be construed as a subsequent remedial measure.

The whole purpose of Rule 407 is that if a company takes actions to change its policies, regardless of whether or not the company believed that at the time they were doing something wrong, that that should be encouraged as opposed to

discouraged. And I would, I would suggest that the Court take a look at some of the cases that were cited in our brief. In particular, the Liger versus New Orleans Hornet case, which was a case involving a re-classification, and the Court held that subsequent re-classification was not relevant to the issue of whether or not the plaintiff had been properly classified at the time of the lawsuit. Same thing with the Mike versus SafeCo Insurance Company case.

MR. DONELON: One case was actually a company that said it Was part of their standard routine practice, religiously, whether it be quarterly, every other year, review all of their employee positions to evaluate whether they're in compliance with the law. That's not the case here.

To point out not many people were affected by Project Park, really, I don't think it's very relevant. There's very few current employee joint class actions where few people step forward and say I worked for you every day. Now, I'm going to be suing you. Not many current opt-in cases. You know, the fact is this Project Park, Judge, the person I deposed, I asked him, all these folks who had gotten moved from assistant branch manager to branch manager, how was that pay handled. His position was we took that salary, just converted it to an hourly rate of pay. That's an important comment because that, as I pointed out correctly, yearly, one of the things you look at regarding persons primarily under

FSLA is how does their pay compare to the people who you claim whose job they're really doing? How do those two compare? That is the situation where they converted all salaries.

MS. BLOOM: I think that points out one of the fundamental problems with admitting any evidence about Project Park. Were Mr. Donelon were to put on evidence of that, we would put on witnesses who would talk about the human resource considerations for why, when you have a re-organization, you're not going to reduce somebody's pay. What are the reasons behind a decision like that? That has nothing to do with whether or not when somebody, whether or not any of the four hundred seventy-three people who were functioning as assistant branch managers, what each of those people were doing and whether each of those people were performing managerial tasks.

MR. DONELON: The comment I would make, you've probably heard enough, is if they take any position that the job descriptions, that any of these employees did function and operate under, does in and of themselves prove that they were exempt employees and then they later have a subsequent job description? That completely, I think, changes the whole ball game on their position by going three or four pages long, spelling out all these management things they can do that didn't exist beforehand. I think that would certainly open the door for allowing that stuff in evidence.

THE COURT: That's different. I'm going to grant your motion. I'll put this in writing with a memorandum. With the Clerk of Court, of course. Okay.

MR. DONELON: Your Honor, just for clarification, though. When we go to have the one witness who takes the stand to testify, we showed up for work. I was instructed I'm going to be a banker. He should be able to say, by the way, you do the same work I've --

MS. BLOOM: The motion was just granted. This is --

MR. DONELON: This is not Project Park. Even if one of our witnesses says, when I worked as a banker, this is what I did. When I worked as an assistant branch manager, they're identical. One of them gets paid overtime. One doesn't. Certainly relevant information.

MR. BATTEN: He can certainly testify about what he does on any given day. What he can't testify to and what was just covered was, what was covered by our motion, is for him to somehow tie it to Project Park.

MR. DONELON: He is not going to testify I came to work and I was instructed that I was going -- no longer an assistant branch manager. I was going back to be a banker. Leave it at that. Fine. What's changed. Nothing.

THE COURT: No. He is probably going say, well, there was a re-organization.

MR. DONELON: We can prepare him ahead of time.

THE COURT: Tell him what he was going to say if he tells the truth.

MR. DONELON: Judge, every other ruling on a motion in limine, sometimes you have to let the witnesses --

THE COURT: I'll think about it.

Okay. Defendant wants to exclude evidence of other lawsuits against defendants as irrelevant. What other lawsuits are you talking about?

MS. BLOOM: Mr. Donelon and his team, as you have have heard, have a number, a number of these other lawsuits pending against the defendant in other jurisdictions. I think you knew at one point they had a state law claim here that was subject to a fight in state court in Pennsylvania. They've got some actions going on up in Illinois. We just want to insure that they're not going to reference any of those other actions in the context of this trial, because that could be highly prejudicial and make it seem like there is more truth behind the allegations in this case. And it's completely irrelevant to whether or not the people in this case were or were not properly classified.

THE COURT: Had you planned on introducing evidence of other lawsuits?

MR. DONELON: Unless they kick the door open some way. We have thirty-five or sixty-seven other cases. Are certified class actions right now. But, again, this may have

to delve into some of these folks from New York get all in as witnesses. They're currently part of the class action making the same claim.

MR. WINEBRAKE: Your Honor, in the papers regarding this motion, this was one of the motions where we took the position that it seems like it's premature to rule on it because it could probably be better ruled on in the context of what is actually happening at trial. There may be circumstances where someone's testimony would open the door.

For example there's a good faith defense that's being asserted by the defendants and it's possible that with respect to the good faith defense somebody's testifying about the company's efforts to review the law. It's, it could possibly become relevant in that context, what other kind of litigation is out there that that person may or may not have known about.

I'm not saying, Your Honor, that that's going to happen, but I think, consistent with our written papers, the position we would take is that it's best to just leave that issue to trial. We certainly don't intend to affirmatively bring up any of the other litigation in opening argument. And, certainly, if we were to do it, we would, we would give everyone advance notice that that's something that we were going to bring up.

But plaintiffs are a little bit concerned about a

blanket order that would tie our hands at trial if the opportunity were such that it seemed like this stuff should come in.

MS. BLOOM: Your Honor, we would just like a ruling because virtually every time we come to Court Mr. Donelon talks about the other cases. And one thing I think you should know, the New York case, for example, that was -- yes. A certification order was issued and the Second Circuit has now accepted review of plan, a review of the entire decision. No notice has been sent out in that case, but every time that we go to Court in any of these cases they talk about all of the other cases.

And so, we would like, we would like an order so that we can be sure that they're not going to get up in opening statement or they're not going to wrap that into questions of their witnesses. Obviously, if we open the door to that, we open the door to that. We have to live with that. But unless we open the door to that, we would like to know that that's not going to be admitted in this case.

MR. DONELON: I think we've just kind of agreed to that.

THE COURT: Well, I think the motion's granted to the extent they cannot use that testimony in their case-in-chief. If something happens, somehow it becomes relevant, I would have to look at it then. But as it stands right now, I

mean, we are -- don't let people get up and say this defendant, who robbed banks in New York, Chicago, and Detroit, previously.

Okay. Exclude testimony of seventy-six non-opt-in ABMs whose testimony refutes the testimony of plaintiff witnesses. I think I already said that you can bring in some non-opt-ins.

MR. DONELON: But we can also point out they're not part of the class. Was part of your ruling, too.

THE COURT: Obviously, they're not part of the class.

MR. DONELON: As long as we can ask them that on the stand.

MR. WINEBRAKE: Would Your Honor consider putting into the order the instruction about defense counsel not communicating with those individuals, except through plaintiff's counsel?

MR. BATTEN: We would like an opportunity to brief that because they don't represent these people in this case.

THE COURT: Yes.

MR. WINEBRAKE: I think earlier Your Honor agreed with plaintiff's position, that because all of these ABMs that are non-opt-ins are class certified --.

THE COURT: Oh, no. No. I thought we're talking about in this case. If you don't represent somebody in any

case.

MR. WINEBRAKE: We do represent them in another case.

THE COURT: Do you still have a fiduciary relationship with them?

MR. DONELON: Absolutely.

MR. WINEBRAKE: Your Honor had said earlier that in your view all those --

THE COURT: I thought we were talking about in this case. This is another question.

MR. WINEBRAKE: Your Honor had said --

THE COURT: Are all seventy-six of these people that you want to call a member of some other class action that they represent?

MR. BATTEN: Not all of them. A number of them are, but not all.

MR. DONELON: Almost every one. I think two opted out in Massachusetts and --

MR. BATTEN: Well, there's some from other states --

MS. BLOOM: No notice has gone out in New York --

THE COURT: Time out. Time out. Hold on.

Well, it's beautiful day here.

So, you say you have non-opt-ins who do not, who are not represented by them anywhere?

MR. BATTEN: A few. There are others who are

represented by them in other cases, but not represented in this case. There is no class in Pennsylvania in any Court. So, they don't represent them here.

And, Your Honor, last thing Your Honor had said is, back when we were on this topic, your ruling stands. We can't contact them, except through counsel, but that you would consider it. I think it might be worthwhile for to us brief it because it's fairly important to us.

THE COURT: What are you going to ask them?

MR. BATTEN: We want those people to come in, talk about their experience. And it goes, again, this, these questions of representativeness, whether the fifteen people who plaintiffs want to rely on really do speak to company-wide policies or not.

THE COURT: How many assistant branch managers are there in the system?

MR. BATTEN: Over a thousand.

THE COURT: You can't find a hundred fifty who are not part of their class?

MS. BLOOM: Well, they have certified classes in New York and Massachusetts. I think just one in New York is up on review. They haven't sent out notice. There's nine involved in the case here. There was notice for opt-in. Four hundred seventy-three opted in. The biggest concentration of putative class members are in Pennsylvania, New York, and

Massachusetts. So, the people in New York and Massachusetts, though, that elected not to opt-in here, they may be part of their classes, their state law classes in New York or Massachusetts. But as I said, particularly, in New York where there's been no notice and the Second Circuit has taken a look at it, we would at least like the opportunity to brief the issue of whether we can.

THE COURT: First of all, clearly, you cannot interview any of their named plaintiffs or their opt-in plaintiffs.

MS. BLOOM: Absolutely not. Of course, not.

MR. BATTEN: Understand that.

THE COURT: But I guess the question is, are you precluded from interviewing their clients, but only their clients in another context.

MS. BLOOM: Correct. Affirmatively not be in this case.

MR. BATTEN: Right.

MR. DONELON: But they are our clients in these other cases. They are class members. We were appointed by a federal Judge as class counsel. We represent those people.

MS. BLOOM: The exact same subject matter --

THE COURT: You can send me something.

MS. BLOOM: Thank you, Your Honor.

THE COURT: All right. Now, you're talking about

some type of a bifurcated trial. What did you have in mind?

MR. BATTEN: I think we're in agreement on that.

MR. WINEBRAKE: We are not in agreement on that, Judge. There's actually a pretty significant disagreement. Plaintiffs are okay with bifurcation, as long as any witness who has information, as long as the bifurcation order doesn't impact the scope of the testimony provided by witnesses who are both liability and damages witnesses.

For example, if opt-in plaintiff Jones is one of our witnesses, we want, when we call her, we want to be able for her to give her fact testimony that's relevant to liability, as well as her fact testimony that's relevant to damages. We don't want her to have to travel to Pittsburgh twice, once for the damages phase, once or the liability phase. That's an enormous burden on these plaintiffs. That seems to be what the defendants have in mind.

The other problem, Your Honor, is it seems like defendant's bifurcation motion is saying that, is trying to preclude the parties from putting in, during the liability phase, evidence regarding hours worked and evidence regarding pay rates. But as we've already touched upon, both of those issues are also issues that are relevant to liability issues. So, it's, there's a lot of overlap between the type of evidence that's relevant to liability and damages. The only witness in plaintiff's view --

THE COURT: Bifurcating the trial.

MR. WINEBRAKE: I don't know that there is that much benefit to bifurcation, Your Honor. It would certainly affect at least our expert witness. It would maybe simplify the jury instructions during the liability phase a little bit. But as far as economies, there's really not much to be gained in the way of economy by bifurcation because so many of the witnesses that are going to appear in the liability phase are going to be giving overlapping testimony.

And as we emphasized in our papers, it's just contrary to the whole public policy behind the collective action mechanism to require these opt-in plaintiffs to have to go through the burdens of traveling to Pittsburgh twice. Many of them, as you know, live all over the country and we're very concerned about that, Your Honor.

MS. BLOOM: We have, absolutely, not only do we have no objection, but we completely agree that they need to testify about their hours worked, to that part of your prima facie case, and their pay rates. I think our bifurcation motion is really focused on the -- your expert witness. We do think that it makes some sense to consider the experts, if and when there is a liability finding, because the expert piece, at least my experience has been, it is confusing for the jury. It mixes up the flow of the trial. But we have absolutely no objection and, in fact, expect that they would testify about

their hours, pay rates.

MR. WINEBRAKE: In that event, I think that the way that plaintiff's proposed order is drafted is probably more true to that position than the way in which defendant's proposed order is drafted.

MS. BLOOM: I haven't looked at their proposed order in a while. But as far as we're concerned, in terms of bifurcation, the thing that we would like bifurcated is their expert witness. To the extent our expert is a rebuttal to theirs, that portion of her testimony, we would bring her back to do the rebuttal piece.

THE COURT: Sounds right. Did you have anybody who's going to testify on damages, other than your expert, who is not going to testify during liability, that is, or are we just saying any witnesses that you are going to present on damages is the expert.

MR. DONELON: That's correct.

MR. WINEBRAKE: Right.

THE COURT: You just have your expert.

MS. BLOOM: We have some other witnesses that we would potentially call also on the damage piece of it. But if it means bringing them back twice, we will.

THE COURT: Be careful. Also means bring the jury back twice.

MS. BLOOM: I am very conscious of that and,

obviously, would not in any way inconvenience the jury. There may be that some of our witnesses have information that's focused on the actual hours that the plaintiffs worked, or any of the people that testified worked, and/or the representative nature of the testimony.

THE COURT: We're going to talk about how long this trial is going to take in a minute.

All right. Defendant wants to exclude evidence of witnesses' trial testimony that was not properly timely identified in pretrial statement.

MS. BLOOM: I think they've cured that at this point.

THE COURT: Okay. Defendants request an order, providing liability, if liability is established, overtime payments due should be calculated at a one-half of plaintiff's regular rate of pay or in accordance with half-time or fluctuating work-week when computing overtime.

MR. BATTEN: This is a motion, Judge, that, like the Daubert thing, could wait for a damages phase. If you prefer, if you want to decide it now, all I would say about it is that this exact issue has come before five different Circuits, the First, Fourth the Seventh, Eighth, and the Tenth, and every single one of them has said the fluctuating work-week method is how you do it.

Plaintiffs want to say, well, maybe, that's maybe

the underlying agreement between the parties that has to exist in order for that to apply as a fact issue. But there's no argument from them that anybody understood that an ABM was going to be paid any extra for extra hours. So, the factual predicate is not really contested.

THE COURT: All right. We'll hold off. This may be a jury issue.

MR. DONELON: Well, Your Honor, part of it is, and maybe there may be a, an argument to the jury and the jury will make a decision. Judge Conti just issued a thorough opinion on how it should be possibly addressed. It was the jury decided what was the understanding between the parties, initially, regarding how many hours were expected to be worked per week.

THE COURT: She's smarter than me. She knows this stuff.

MR. DONELON: She wrote a thorough opinion on it. So, I mean, that stuff, to say it can be deferred until the damages phase may not be quite accurate because it may be a factual question the jury may have to answer. We might have to put on evidence what was the understanding when we put our folks up on the stand. Well, what was their understanding. Their corporate representative testified that it was expected that this was a forty-hour-a-week job. And if that's how you determine how you make a salary, you divide the salary divided

by what was expected when the job was taken regarding hours. That's how you do the hourly rate. Anything after that, time and a half.

THE COURT: Any Citizens bank employees have a union?

MR. BATTEN: No. Certainly not as relevant here, anyway. But I don't think at all.

THE COURT: Okay. Realistically, how long do you think it will take your case to come in?

MR. DONELON: Judge, you had set aside three weeks. We sat down with Mike, went through it all. A lot of it's going to depend, and we would make, encourage the Court to set some sort of time parameters on witnesses. Only reason we ask you that is, as you know, we've got in a sense, right now, the Court has set aside eleven days of trial work. First day will probably be consumed with voir dire, openings. If need be, we'll have a plaintiff here to start. I don't know if we'll get that person on or not. But dividing the time equally between the parties, that would, roughly, be five days apiece. We are hoping to be able to call between two to four witnesses a day. One thing we don't know, as you know, we've got people flying in from all over the country. Corporate travel making all the arrangements for these people. If I were to put on a witness, say, take an hour with me on direct. But if it takes an unlimited amount on the cross-examination, this isn't going

to work. So, I guess with parameters put on this, it's going to mess our entire logistics of getting people in and/or out of here for the trial.

So, optimistically speaking, the Court, I guess, needs to give us some guidance on what the Court believes is going to be a sufficient number of branch managers to call. We have put thirty on our list. We think within the five days that are given us for trial work, we will probably be able to get on anywhere between ten or fifteen of those people. If they, in turn, also call some assistant branch managers, then you're looking at testimony of whether some is enough. And the case law that we've cited to the Court in the past shows that that is certainly an acceptable amount to testify on behalf of it. The biggest thing, like I mentioned, we have got folks coming in from all over the country that are flying in. We understand that there's no precise time. The attorneys have tried a lot cases. Like herding cats sometimes with witnesses. I do understand that. But at the same time, it would be helpful if we had some knowledge that if I called somebody and said, look, we're going to need you on Tuesday, maybe Wednesday, that there's something to prevent it from actually being on Friday is what I am getting at.

Only way is to set some sort of help for us in this area is to get some parameters. I know a lot of federal Judges do this. I'm not sure whether this Court has or not.

At least from reading your rulings, you seem to be fairly liberal.

THE COURT: Liberal? All right. What do you say?

MR. BATTEN: Well, first of all, Your Honor, my recollection of the last conference was that plaintiffs were saying they thought they could get this case completed in three weeks. And I said I thought it would be more like six weeks. And I have not seen an order that says there's only three weeks on the trial calendar.

We cannot try this case in three weeks. We have a hundred thirty-seven witnesses on our list. We're not going to call one hundred thirty-seven. Don't worry. That's not going to happen. But we may have sixty or seventy witnesses. They're all going to be quite short. I expect direct and cross would be an hour. But that still just is going to take some time to get through those people.

THE COURT: Who are you calling?

MR. BATTEN: Well, it's several categories, Your Honor. Something we've talked about today, some of them are other assistant branch managers who didn't opt into the case and have a different experience than the testifying plaintiffs. Some of it is branch managers and regional managers who are not the plaintiffs and are going to rebut their own testimony, what they actually did day-to-day. Some of them are branch managers who will speak to other opt-ins.

I mean, other ABMs who are not opt-ins. All in search of trying to get a picture of whether the plaintiff's allegations is a company-wide practice, they've done the same thing every day and none of it is managerial, is accurate or not. So, it breaks down into several different groups. We want to call some people from each of those kinds of categories to try to give the jury a full picture of exactly what working at Citizens as an ABM is like, again, because the plaintiff's witnesses we think are carefully selected to present a certain view of how the job operates.

THE COURT: No. They were carefully selected? Dastardly. Dastardly.

MR. BATTEN: There are a lot.

MR. DONELON: I just remember when we met, you asked me how much time at the last conference. I said, Judge, we think four weeks. You laughed. Said, you don't know me very well. Judge, I'll do it in two weeks if we limit the number of witnesses. As far as I'm concerned, you don't need to have twenty, thirty ABMs to testify. We'll put on as many as the Court likes. Then it was concluded that we found a date. It was three weeks. We sat down, counted out dates, because there's a holiday involved. You don't do work on Fridays. We sat here with Michael and counted out the days. We had three weeks. We think that's sufficient.

MR. BATTEN: The core of our defense, Your Honor,

requires that we be able to call quite a number of people. The number of witnesses itself is an irrelevant issue as opposed to just their testimony. They're not going to be cumulative. I'm very sensitive to that issue. They're all going to be talking about their unique experiences.

You've said, since you filed the complaint in this case, these are company-wide procedures that affect everybody the same way. That is the core of the plaintiff's case. And it is the fact that we need to knock down. The way we have to do that is by presenting the jury with a broad enough swath that they get a sense. If they call ten and we call ten, that's a very different trial, a very different inference, about representativeness than if we call ten and they call fifty. It's the core of our defense. We'll be as brief and non-cumulative as we can, but we need to be able to do that.

MS. BLOOM: We take issue take with the fact that in the nine states and a thousand branches and trying rely on a handful of people and saying from this handful of people this is representative about what all the people in these nine states and these thousand branches did on day-to-day basis. That's just untrue, Judge, --

MR. DONELON: That's not what --

THE COURT: Hold on. She can only take one at at time. She's good, but she can only take down one at a time.

MR. DONELON: It's not about all these people. It's

about the four hundred seventy people in this case. We're going to put on all this testimony. Are you one of the four hundred seventy people? Okay. Now, in closing argument, I'm going to say to the jury, we are here for about four hundred seventy people. They've talked a hundred, two hundred other people. We're here to talk about these four hundred seventy people. There's been no evidence to rebut.

MR. BATTEN: We will have saw and heard from four hundred fifty --

MR. DONELON: That's not what's been --

MR. BATTEN: What's been said to the Court in this hearing today is that we have an opportunity to show that the inference from ten to four hundred seventy is not a good inference. The way we do that is by bringing in other people to show that the testimony is not representative.

MR. DONELON: I don't think that's, maybe I am mistaken, but at some point, Judge, we're going to need to know what's going to be the sufficient representative number. I mean, all these cases that are tried, that we briefed the Court on the Family Dollar, fifteen people came in, testified on behalf of two thousand.

THE COURT: Cases go on and on with numbers like that.

MR. DONELON: And they were all upheld on appeal.

THE COURT: All right. Well, I'll allocate sixteen

trial days for this case. How I do it, you each get eight. You'll be on the clock. Meaning, you get eight days of testimony, from 9:30 to 4:30. How you use your time is up to you. You can use it, you can take opening statement for a day. Closing statement for a day. You can use it on direct. You can use it on cross. Again, but when your time is up, it's up. So, you're going to have to focus your time because, if your time is up, you don't get a closing statement. You understand? When your time is up, it is up.

I'm going to say that a lot of times because, just to make sure you understand this, because a lot of times people will come in here thinking, well, you know what? We'll cry at the end of the trial. Judge, you got to let me put in two more witnesses. Well, no, I don't. When your time is up, it's up.

Now, the sixteen days again, we are not going to take testimony on Fridays.

MR. DONELON: I think we got one federal holiday in there, too, if I remember right.

THE COURT: Well, maybe. Martin Luther King Day.

MR. WINEBRAKE: Voir dire, things of that nature, that wouldn't count on plaintiff's first day; would it?

THE COURT: What wouldn't count?

MR. WINEBRAKE: First day we do voir dire?

THE COURT: No. No. I'm not going to take time

away from picking a jury. That's both sides. But opening statements are a part of the trial. I will not count 9:00 a.m. meetings. I count side-bars. If you ask for a side-bar, that comes off your time.

MR. DONELON: In essence, so, we can do the math. I guess you probably don't count the morning break, afternoon break?

THE COURT: We actually do figure that out. No. It's Court time.

MR. PALUS: Yes.

THE COURT: Do we have anything else during that time, Mike?

MR. PALUS: We have a criminal trial scheduled to begin January 14, Judge.

THE COURT: There's going be a break, then. A substantial break.

MR. PALUS: Yes.

THE COURT: I'm going to be out of country.

MR. BATTEN: From when to when?

THE COURT: I think the last week in January; isn't it?

MR. PALUS: Yes.

THE COURT: And I cannot get out of it.

MR. DONELON: Because there was three weeks in January that were set aside.

THE COURT: Last week, I'll be out of the country.

MR. BATTEN: If we started first thing in February, would that give us a block after Your Honor returns?

MR. PALUS: We have criminal trial.

THE COURT: Which one?

MR. PALUS: Gerideau-Williams, the one you just signed.

THE COURT: Re-scheduling time when?

MR. PALUS: Middle of February.

THE COURT: If we move it into March, it's going to be disjointed. I have a judicial conference, which means I'm in D.C. April, I'm at the Chief Judges Conference.

MR. DONELON: Let's make this a two-week trial.

THE COURT: No. We could pick the jury in January. Tell them to come back, cut off one day. All right. Let's just stick with Michael and go with the dates.

MR. WINEBRAKE: Your Honor, I think if, especially if the trial is going get pushed back further into the year, it might make sense, this Daubert probably could happen ahead of time, so we don't get a session where the jury is going have to be out for a day or two and then come back for the damages phase.

THE COURT: That's a good idea.

MR. BATTEN: That's fine.

MS. BLOOM: That's fine with us. We have no

objection.

THE COURT: Okay.

MS. BLOOM: Work with Mike on that.

MR. BATTEN: I would be doing my client a disservice if I didn't ask you for more than sixteen trial days.

THE COURT: You did your client a service, but I --

MR. BATTEN: Thank you.

THE COURT: You can see how much problem I have putting it in, now.

MR. BATTEN: I understand. I guess my hope was there would be a bigger block. But I understand Your Honor's ruling.

THE COURT: We got a nice bunch of time in 2016, I think.

Now, I'll go through some of this stuff now so you can prepare to know what going to happen. I don't know if I went over this stuff with you before, but we meet every day at 9:00 a.m. What I do at 9:00 a.m. is I go over what's going to happen. Get routine offers of proof. Anything you know is an evidentiary problem, you know is going to come up, tell me then because, then, if I have the time to rule on it, if I can rule on it, I'll rule on it. Then, if not, I'll at least have time to think about it. If you want well thought-out decisions, give me time to think about them.

We try to get in the courtroom at 9:30, sharp. Put

anything, grease my skids, tell me at 9:00 a.m. If I've made a ruling the day before and you want to put a proffer on the record for appellate review, tell me the following day at 9:00 a.m. and I will let you have time to put your offer on the record. I do not have side-bar conferences as to things like that.

All your exhibits should be marked before you get here. I don't care if your first exhibit is No. 196, but they all should be marked before you get here. If the exhibits are not going to be objected to, we'll introduce them here in chambers without taking up time in the courtroom. In the courtroom, we don't have to make a written ruling. Your Honor, I move Exhibit No. 197. If we admit it in chambers, it's admitted. Just use it. If something's going to be objected to, object to it here, not in the courtroom.

If you're examining the witness, please remain at the lectern. I don't allow dancing around the courtroom. If you have something you want to show the witness, it can't be used on the ELMO? Your Honor, may I approach the witness. Yes. If it's going to be a short colloquy, I'll let you do it from the witness box. If longer than that, you'll have to go back.

MR. BATTEN: That's direct and cross from the lectern?

THE COURT: Direct and cross from the lectern. And

the thing is I know sometimes it seems like I know people talk about me being too formal in the courtroom, but in all candor I'm trying to listen. I'm taking notes. I find it distracting to have lawyers walking around the courtroom. It's distracting to me, to the court reporter. And she's trying to look at the witness and the witness can't hear you because you're not facing them. Very practical aspect to that.

We don't play tag team. Whoever conducts a direct examination of a witness will protect the witness on cross. Same thing on the other side. If you're going to object to a question, we've not dealt with it here, please rise. Objected. Asked and answered. Objection. Hearsay. Objection. Beyond the scope of direct. If you stand up and say, Your Honor, I have been quite patient with counsel's flagrant disregard of the most basic Rules of Evidence, at this particular juncture I'm going to cut you off. I'm going to say, what is the legal basis of the objection. If you don't come out with a word that's in the Rules of Evidence, I'm going to cut you off and objection overruled on that basis alone. Okay? I'm just telling you so you know.

I like counsel to meet at the end of the day. We usually knock off about 4:30, but I like counsel to meet at the end of the day and go over each other's what are you going to do, exhibits, what exhibits are you going to use, who are

you going to call. I would like the 9:00 a.m. conference to go a little bit easier; okay?

Except for the one ruling, the transcript will serve as the opinion of Court on all my rulings. But the one I'm going to put something on the record right now.

MR. BATTEN: May I ask, Your Honor, about openings and closings? Can we stand?

THE COURT: Yes. There will be a lectern over there right in front of the jury box. We have another lectern in the courtroom for that purpose.

MR. BATTEN: We should be at the lectern?

THE COURT: You should be at the lectern. If you have, say, some demonstratives that you want to use, I'll let you do that. That's not a problem. But you're simply going to give a straightforward opening statement. There could be a lectern in front the jury box. It will be there for that purpose and then we'll take the down.

If you don't know how to use the ELMO, learn between now and then.

MR. DONELON: Does your ELMO project to a t.v. screen or large --?

THE COURT: Go into the courtroom before you leave. Look around. We have monitors with individual monitors at the tables. I have one. My Courtroom deputy has one. Clerk has one. All four of the counsel table have one. And there is a

monitor for every other juror in the jury box. So, you don't have to worry about placement or anything like that.

If you're going to have electronic devices in the courtroom? Have a worker there, a technician.

MS. BLOOM: We're hoping to able to have a laptop. Have somebody help us use it.

THE COURT: Okay. Well, before we get to the trial, call Mr. Palus and tell him someone's coming in with all this stuff so he can alert the Marshals. They're very peculiar about this.

I don't have too many more rules than those. One thing that I've always found helpful and I tell people this. I haven't lost a case since I got this job. But one technique that I think you overlook all the time, particularly, if you're going to have a lot of witnesses over an extended period of time, then you give your closing statement. You say, you remember Joe Smith? He said. And they don't remember Joe Smith. Take Joe's picture, put it on a disk, and put it up there when you're talking about what Joe Smith said, because they're not going to remember that.

Same thing is true of exhibits. That's why you have the ELMO. That's why we have it available and so on.

So, any questions of me as to procedures?

MR. DONELON: Just voir dire? If you can maybe give us a little more description on that?

THE COURT: Michael Palus does it. You can submit questions. Like I said, you can submit questions, but Michael does it. I'm not even in the courtroom.

MS. BLOOM: Should we ask him if, if he puts them in the box, if you can strike back or not?

THE COURT: We've done this before.

MS. BLOOM: Right. I figured I just -- everybody does it differently. So, I just like to know.

THE COURT: We'll have written instructions for you.

MS. BLOOM: Okay. Great. Thank you. And, Your Honor, on how to handle voir dire, I was wondering, for cause strikes, if the Judge wasn't in the courtroom, how that would be handled.

THE COURT: Anything else?

MS. BLOOM: I don't think so.

THE COURT: Okay. Question?

MR. WINEBRAKE: Your Honor, can I raise one issue? One thing that we're really concerned about, I know this is not happening January 14, anymore, but with respect to the opt-in plaintiffs who are on the Defendant's Exhibit list, but not on ours? That are on the defendant's witness list, but not on ours? We have been really concerned about just the logistics of bringing them into Pittsburgh to testify. The plaintiffs would really appreciate it if sometime, maybe a month or so in advance of trial, if we can get a commitment

from the defense counsel as to they have got a hundred fifty witnesses on their list. Are they really going to call these opt-in plaintiffs? And, if so, when are those people going to testify, because we have to fly them in. They have jobs and we can't just have them coming down here, sitting around for a week, waiting for defense counsel to pick them.

So, if there could be some protocols to be put in place for that, I think that would be fair to the opt-in plaintiffs. I think it would make everything go a lot more smoothly.

My concern is we're causing a lot of distress to these plaintiffs and, for all we know, the defendant may never call them. And that's -- we, certainly, don't want to have to fly in people who aren't going be called.

MS. BLOOM: You know what would be really helpful in that regard is if we knew exactly who you were going to call. If we could have a better idea. I'm sure you're not going to call all thirty-three people. Frankly, we, certainly, don't want to inconvenience any of the opt-ins. We would love to work with you on that, but what would make that process go a lot smoother would be if you let us know who you are really going to call because that will impact the opt-ins.

MR. WINEBRAKE: We're willing to do so to a degree. We're not, unilaterally, going to tell you who our specific witnesses are while we're still looking at a hundred fifty

person witness list. That's not fair.

THE COURT: Okay. Thank you.

(Whereupon, the in-chambers conference was concluded on the fourteenth day of December, 2012.)

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C E R T I F I C A T E

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I certify by my original signature herein that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Sandra Wenger, FCRR, CM
Official Court Reporter

DATED: January 10, 2013

*****NOT CERTIFIED WITHOUT ORIGINAL SIGNATURE*****